Supreme Court, U. S.
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NO. 80-5456

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

EDWARD JOHN BULLWINKLE III,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT
OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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ISSUES PRESENTED

I

Whether, as construed by previous opinions of this Court, a husband has standing to challenge the search and seizure of his wife's purse under the facts in this case as a violation of his Fourth Amendment rights.

II

Whether, as construed by the California Court of Appeal to mandate warrantless searches of closed containers of personal effects in all cases where a defendant is arrested for a felony, California Penal Code section 1412 and California Government Code section 26640 are facially, and, as applied in this case, unconstitutional in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

III

Whether, in the absence of exigent circumstances, a warrantless search of a closed container of personal effects in the exclusive custody and control of police violates the Fourth and Fourteenth Amendments to the Constitution of the United States?

IV

Whether application of an "inevitable discovery" rule so as to allow findings of fact by a state Court of Appeal without evidentiary support, as were made in this case, deprives an appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and acts to deprive him of a full and fair hearing on his motion to suppress evidence?

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Court of Appeal for the Second Appellate District of California on the ground that the issues raised in the appeal are so unsubstantial as not to require any further argument.

I

THE NATURE OF THE CASE

A. Proceedings Below

Appellant Edward Bullwinkle was charged in an information filed by the District Attorney of Santa Barbara County with five counts of burglary, in violation of California Penal Code section 459, six counts of receiving stolen property, in violation of California Penal Code section 496, and two counts of issuing a check without sufficient funds, in violation of California Penal Code section 476(a). Following appellant's plea of not guilty, he unsuccessfully moved to suppress evidence seized from his wife's purse and in their apartment pursuant to California Penal Code section 1538.5.

After denial of appellant's motion to suppress the evidence, he

pleaded guilty to the two counts of receiving stolen property and was convicted by jury of three counts of second degree burglary and two counts of receiving stolen property. Appellant was sentenced to state prison for a term of five years and eight months.

Appellant thereafter timely pursued an appeal to the Court of Appeal for the Second District of California for review of the denial of the motion to suppress under California Penal Code section 1538.5. The appeal was consolidated with that of his wife, Lisa Bullwinkle. The judgment was affirmed on appeal in a decision filed April 24, 1980. Appellant's petition for rehearing was denied, and a petition for hearing was denied by the Supreme Court of California on June 25, 1980.

This appeal is taken from the

judgment of the Court of Appeal for the Second Appellate District of California. The appeal of codefendant Lisa Bullwinkle has previously been docketed (No. 80-5263).

B. The Facts Relating to the Motion to Suppress

Santa Barbara Police Officers Ira Watson and John Alpert went to an apartment in Santa Barbara on March 3, 1978, with arrest warrants for appellant Edward Bullwinkle and his wife, Lisa Bullwinkle, for writing checks without sufficient funds. The officers were admitted into the apartment and placed appellant and his wife under arrest in the living room. Codefendant Lisa Bullwinkle indicated a desire to go upstairs to change her clothes. She went upstairs to a bedroom, and when Detective Watson heard a door close, he followed

her upstairs. Detective Alpert and appellant joined codefendant Lisa Bullwinkle and Detective Watson in the bedroom.

Detective Alpert asked codefendant Bullwinkle if she wished to take her purse, indicating a leather bag on the floor. She said the bag was not a purse, but instead was a camera case. Codefendant Bullwinkle picked up another bag, her purse, from the floor, and Detective Watson immediately seized it and handed it to Detective Alpert.

Detective Alpert looked in the purse for weapons before appellant and his wife were transported to the police station. Inside the purse he observed only checkbooks. Upon arriving at the police station, Detective Alpert emptied the contents of the purse on his desk, looking for evidence such as checks

relating to the charged offense or other offenses.

As Detective Alpert examined the contents of the purse, Detective William Rogers passed by and noticed a photograph of appellant, which he felt resembled an artist's drawing of a suspect in a burglary of a camera store. Detective Rogers compared a list of camera serial numbers found in codefendant Bullwinkle's purse with items stolen in the burglary, and based upon this information, obtained a search warrant for the residence of appellant and his wife. Evidence discovered in that search led to the filing of the burglary and receiving stolen property charges.

II

ARGUMENT

THE CASE WAS NOT DOCKETED IN A TIMELY FASHION AND FURTHER FAILS TO PRESENT A SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. The Jurisdictional Statement Was Not Timely Filed

By statute and rule of court, a jurisdictional statement must be filed not more than 90 days after entry of the judgment appealed from. (28 U.S.C. 2101(c); Rule 12.1, Rules of the Supreme Court of the United States.) Because appellant failed to file his jurisdictional statement within 90 days of the judgment, this appeal should be dismissed.

Following conviction, appellant took an appeal to the California Court of Appeal, which affirmed the judgment on April 24, 1980. (See Appellant's Supp. Appx., p. 3.) Appellant filed a timely

petition for hearing in the California Supreme Court, which was denied on June 25, 1980. (Appellant's Supp. Appx., p. 22.) Upon denial of hearing in the California Supreme Court, the judgment of the California Court of Appeal became final and the 90-day period for filing of the jurisdictional statement commenced. (See Market Street R. Co. v. Comm'n. (1945) 324 U.S. 548, 552-553, 89 L.Ed. 1171, 65 S.Ct. 773.) Computing the 90-day period from June 25, 1980, as required by Rule 29.1, results in the 90th day falling on September 23, 1980. The jurisdictional statement, which was docketed on September 26, 1980, was therefore untimely.

The failure to file a timely jurisdictional statement has been viewed as the basis for dismissal in this Court. (Hutter et ux. v. Korzen (1972)

409 U.S. 905, 34 L.Ed.2d 166, 93 S.Ct. 216 [14 days late]; Shapiro v. Doe (1970) 396 U.S. 488, 24 L.Ed.2d 677, 90 S.Ct. 641 [2 days late].) While it is true the defect "is not jurisdictional" (Johnson v. Florida (1968) 391 U.S. 596, 598, fn. 1, 20 L.Ed.2d 838, 88 S.Ct. 1713), no excuse has been tendered for the late docketing of the appeal, and appellee strongly urges this Court to dismiss the appeal for failure to comply with Rule 12.1. (Pittsburgh Tow Co. v. Mississippi Barge Line (1966) 385 U.S. 32, 32-33, 17 L.Ed.2d 31, 87 S.Ct. 195.)

B. Appellant Has No Expectation of Privacy in His Wife's Purse

The instant case involves the propriety of a search of a purse belonging to appellant's wife, codefendant Lisa Bullwinkle. In California, appellant was not required to establish or show that he

had an expectation of privacy in his wife's purse in order to challenge the search of the purse under the state's vicarious exclusionary rule. (See Kaplan v. Superior Court (1971) 6 Cal.3d 150, 156-161, 98 Cal.Rptr. 649, 491 P.2d 1; People v. Martin (1955) 45 Cal.2d 755, 759-761, 290 P.2d 855.) It is clear, however, that appellant had no expectation of privacy in the purse and may not challenge the search in this Court. The judgment should therefore be affirmed.

Last term in Rawlings v. Kentucky (1980) ___ U.S. ___, 65 L.Ed.2d 633, 641, 100 S.Ct. ___, this Court reaffirmed the principle that a defendant may not challenge the search of the purse of a third party unless he has an expectation of privacy in the purse. (See also Rakas v. Illinois (1978) 439 U.S.

128, 140, 58 L.Ed.2d 387, 99 S.Ct. 421.) Moreover, it was held in Rawlings that the defendant's ownership of property seized from a third person's purse is insufficient to establish an expectation of privacy to challenge the search since "'archane'" concepts of property law do not control the ability to claim the protections of the Fourth Amendment. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 642; see also United States v. Salvucci (1980) ___ U.S. ___, 65 L.Ed.2d 619, 628, 100 S.Ct. ___; Rakas v. Illinois, supra, 439 U.S. at pp. 149-150, fn. 17.) It is, of course, appellant's "burden of proving not only that the search [of his wife's] purse was illegal, but also that he had a legitimate expectation of privacy in that purse." (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 641.)

Despite the clear holdings of this Court that concepts of property law do not control one's ability to challenge a search under the Fourth Amendment, appellant nonetheless commences his argument by contending that his interest in his wife's purse under California community property law establishes his right to challenge the search. (Jur. Stmt., pp. 24-26.) Because the purse is presumptively community property under California law, appellant reasons he was a co-owner of the purse and who could challenge its search.

Appellant's contention ignores the settled state of the law as well as the precise holding in Rawlings v. Kentucky, supra. As noted above, principles of property law do not establish a defendant's expectation of privacy for purposes of the Fourth Amendment.

(Rakas v. Illinois, supra, 439 U.S. at pp. 149-150, fn. 17.) Indeed, application of the abstract principles of California's community law provide no analytical assistance in determining if appellant had an expectation of privacy in his wife's purse. Appellant's position amounts to the type of artificial device founded upon state property law which this Court has refused to adopt as a basis for asserting a reasonable expectation of privacy.

Indeed, appellant's position is far weaker than that of the defendant in Rawlings v. Kentucky, supra, in which narcotics belonging to the defendant were seized from the purse of a woman present at the time of the arrest. The defendant in Rawlings claimed that ownership of the narcotic substances created an expectation of privacy which justified his

Fourth Amendment challenge to the search of the purse. The contention was rejected on the basis his ownership of the drugs, and concepts of property law do not establish an expectation of privacy in the purse. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 642.)

If a defendant's actual ownership of the contents seized from another's purse does not establish a reasonable expectation of privacy under Rawlings, it is readily apparent that appellant's position that artificial concepts of California community property law created an expectation of privacy in his wife's purse is devoid of merit. Consistent with this Court's repeated pronouncements, appellant cannot contrive a reasonable expectation of privacy based only upon the California property law. (Rawlings v. Kentucky, supra, 65 L.Ed.2d

at p. 642; Rakas v. Illinois, supra, 439 U.S. at p. 149, fn. 17.)

In addition to relying upon his alleged community property interest in codefendant Lisa Bullwinkle's purse, appellant further argues that he had a reasonable expectation of privacy in the purse because it contained his passport. Appellant reasons that the instant case is distinguishable from Rawlings v. Kentucky, supra, because: (1) the purse belonged to appellant's wife rather than an acquaintance; (2) the purse "appears to have been the regular depositing site for the passports of both spouses"; (3) appellant had a right to exert dominion and control over the purse; (4) the purse was a secure place to keep the passport; and (5) there are no facts to show that appellant did not believe his wife's purse was secure from governmental

intrusion. (Jur. Stmt., pp. 26-28.)

As noted above, it was appellant's burden to establish that he had a reasonable expectation of privacy in his wife's purse under the Fourth Amendment as a condition to his challenge of the search of the purse. (Rawlings v. Kentucky, supra, 65 L.Ed.2d at p. 641; Rakas v. Illinois, supra, 439 U.S. at p. 131, fn. 1.) Despite this obligation, appellant presented no evidence on the issue in state court, and his asserted expectation of privacy in this Court is both legally and factually inadequate to show a violation of appellant's Fourth Amendment rights.

Contrary to appellant's argument, a purse would normally create an expectation of privacy only in the person to whom it belongs. A purse is a uniquely personal item of property, and

not one in which a third person would have an expectation of privacy absent some strong factual showing. Having made no such showing whatever of an expectation of privacy in the trial court, appellant has not satisfied his burden of establishing his ability to raise the Fourth Amendment contention.

An examination of the factors relied upon by appellant demonstrates the inadequacy of his argument. The fact that the purse belonged to appellant's wife, rather than an acquaintance as in Rawlings, says absolutely nothing about appellant's purported expectation of privacy in this item of personal property. Appellant has established only that his wife owned a purse, but has failed to present evidence that he had a privacy interest in the purse. Appellant's statement that the purse appears to have

been the "regular depository site for the passports of both spouses" is totally devoid of evidentiary support in the record. Appellant cannot point to any evidence to support the statement that the purse was a "regular depository site" for any passport. Moreover, there is no evidence appellant even knew his passport was in his wife's purse.

Equally without evidentiary support is appellant's assertion that he had a right to exert dominion and control over the purse. The record is devoid of any evidence that appellant had any right to control his wife's purse. Similarly, appellant's argument that the purse was a secure place to keep the passport provides no assistance in establishing appellant's expectation of privacy in his wife's purse in view of the absence of evidence to establish how the passport

got into the purse. The record fails to establish that appellant had knowledge of the passport's presence in the purse. Finally, while there may not be facts to show that appellant did not believe that his wife's purse was secure from governmental intrusion, the burden was on appellant to affirmatively "establish an objectively reasonable expectation of privacy." (See Rakas v. Illinois, supra, 439 U.S. at p. 143, fn. 12.) The absence of evidence on the point establishes only that appellant failed to sustain his burden of showing that the search involved an item in which he had a reasonable expectation of privacy.

In view of appellant's wholly inadequate showing to support a finding that he had an expectation of privacy in his wife's purse, he may not assert a violation under the Fourth Amendment.

"Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (Alderman v. United States (1969) 394 U.S. 165, 174, 22 L.Ed.2d 176, 89 S.Ct. 961.) Appellant's lack of an expectation of privacy in his wife's purse is manifest from this Court's opinions, and accordingly the instant case fails to present a substantial federal question requiring further consideration.

C. The Arguments Purportedly Incorporated by Reference From the Jurisdictional Statement of Codefendant Lisa Bullwinkle Are Not Properly Raised in This Court

Having utilized 28 pages in his jurisdictional statement without discussing the merits of the search issue, appellant purports to incorporate by reference three additional substantive

arguments from the jurisdictional statement of codefendant Lisa Bullwinkle in case No. 80-5263. (See Appellant's Jur. Stmt., pp. 28-29.) Appellee submits that the incorporation by reference is not authorized by court rules and accordingly appellant failed to properly raise the substantive search issues he purports to incorporate.

Appellant relies on Rule 15.3 to justify incorporating by reference from the jurisdictional statement of codefendant Lisa Bullwinkle. Rule 15.3 provides as follows:

> "The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendices."

It is apparent from the clear language of Rule 15.3 that the rule does not in any way authorize incorporation by reference. Appellee is aware of no other rule which might authorize incorporation by reference.

Appellant has therefore apparently attempted to circumvent the 30-page limitation on jurisdictional statements by incorporating some 16 pages of argument from the jurisdictional statement of codefendant Lisa Bullwinkle, in addition to the 30 pages of appellant's own jurisdictional statement. Rule 15.3 is clear that the jurisdictional statement shall not exceed 30 pages. Because appellant's attempt to incorporate by reference is not authorized, is contrary to Rule 15.3, and raises issues which appellee could not possibly respond to in the 30 pages

allowed for this motion under Rule 16.3, appellee submits that issues III through V are not properly raised before this Court.

CONCLUSION

For the foregoing reasons, appellee moves that the appeal be dismissed, or in the alternative, that the judgment be affirmed for failure to raise a substantial federal question.

Respectfully submitted,

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